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Nos. 83-943, 83-1030 and 83-1119

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*, *Petitioners*,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

RYDER TRUCK LINES, INC., *Petitioner*,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS, *Petitioner*,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENT PRIVATE TRUCK COUNCIL OF AMERICA, INC. IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a decision of the Interstate Commerce Commission reformulating the criteria for determining whether a particular motor carrier leasing arrangement constitutes regulated for-hire carriage or unregulated private carriage is consistent with the Motor Carrier Act of 1980 and is otherwise lawful and within its authority to make.

2. Whether the court of appeals' affirmance of the Commission's reliance on the National Transportation policy conflicts with a decision of the Fifth Circuit.

3. Whether the court of appeals correctly decided that the Commission's decision was not in conflict with a decision of this Court.

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OPINIONS BELOW

The opinion of the Interstate Commerce Commission (Pet. App. 1a-50a)[1] is reported at 132 M.C.C. 756 (1982). The opinion of the court of appeals (Pet. App. 59a-93a) is reported at 716 F.2d 1369 (1983).

[1] "Pet. App." refers to the appendix to the petition in No. 83-943.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1983. The petitions for a writ of certiorari in Nos. 83-943, 83-1030 and 83-1119 were filed on, respectively, December 7, 1983, December 22, 1983 and January 9, 1984. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

Since the Motor Carrier Act of 1935, 49 Stat. 543-67, 49 U.S.C. § 10101 et seq., the Interstate Commerce Commission has had regulatory jurisdiction over motor carriers that provide interstate transportation of property and passengers "for compensation" (49 U.S.C. § 10102(12), (13))—commonly referred to as "for-hire" transportation. The Commission does not have jurisdiction, however, over "private" motor carriage—that is, transportation by a person or firm of its own property for its own purposes. 49 U.S.C. § 10102(14).

The statute contains no precise delineation of the factors and circumstances that distinguish "for-hire" transportation from "private" carriage, and the Commission has therefore been obliged to formulate various tests since 1935 to describe that distinction. The original Motor Carrier Act of 1935 had no definition of private carriage at all (Pet. App. 61a). In 1958 Congress amended the Act to provide some clarification of the distinction by enacting a provision (now codified in 49 U.S.C. § 10524), which states that transportation is private carriage exempt from the Commission's jurisdiction when

(1) the property is transported by a person engaged in a business other than transportation; and

(2) the transportation is within the scope of, and furthers a primary business (other than transportation) of the person.

Even that clarification did not serve to resolve the question whether transportation should be deemed "for-hire" or private in the innumerable different arrangements and circumstances in which it might arise (see Pet. App. 63a-64a and n.4). As the court of appeals observed, the Commission has articulated a number of different tests over the years, the latest of which petitioners have challenged in this case.

In this case, the Commission reexamined its prior views regarding an arrangement whereby a shipper leases a vehicle and the services of a driver from the same source—most commonly from persons known as "owner operators," who own and drive one or two vehicles. Generally, the Commission has not regarded a lessor of equipment only, or of driving services only, as providing "for-hire" transportation, but in 1940 the Commission concluded that single-source leasing should be presumed to constitute for-hire carriage. *H.B. Church Truck Service Co., Common Carrier Application*, 27 M.C.C. 191 (1940). The inquiry, the Commission said, was "who has the right to control, direct and dominate the performance of the service." 27 M.C.C. at 195. Accordingly, the Commission stated that the presumption of for-hire carriage could be rebutted by evidence that the shipper rather than the owner-operator had that right—"as for example, if the equipment were operated by the shipper's employee." (Id. at 196.)

In 1959 the Commission articulated an additional, "substance," test. In *Oklahoma Furniture Mfg. Co.*, 79 M.C.C. 403 (1959), the Commission found an arrangement to be "for-hire" transportation because, even

though it assumed that all the owner-operators providing the service were bona fide employees of the shipper, the financial arrangements between them and the shipper indicated that the transportation was "in substance" for-hire. These included the facts that the owner-operators paid all operating costs and trip expenses, guaranteed the shipper a fixed cost for the transportation, and assumed the risk of all losses. 79 M.C.C. at 412.

In *United States* v. *Drum*, 368 U.S. 370 (1962), this Court upheld the Commission's formulation of the *Oklahoma Furniture* test. Recognizing the imprecision of the statutory language, the Court described the essential concept of private carriage as follows (368 U.S. at 375-76):

> From the outset the Commission has correctly interpreted [the statutory definitions] as importing that a purported private carrier who hires the instrumentalities of transportation from another must—if he is not to utilize a licensed carrier—assume the characteristic burdens of the transportation business.

The Court then held that the Commission's resolution of the question in that case was within its administrative discretion and that the district court's contrary conclusions reflected "an unwarranted intrusion into the administrative domain" 368 U.S. at 386. Thus, the Court stated (368 U.S. at 375-76, 385):

> The problem is one of determining—by reference to the clear but broad remedial purpose of a regulatory statute committed to agency administration—the applicability to a narrow fact situation of imprecise definitional language which delineates the coverage of the measure.

* * *

> We think that [its] conclusions were well within the range of responsibility Congress assigned to the Commission.

In decisions after *Drum*, the Commission continued to apply the presumption of "for-hire" carriage adopted in *Church* and to use the "control" and "substance" formulations of the test employed in *Church* and *Oklahoma Furniture*. Whether particular arrangements met those standards, however, depended on the particular facts and circumstances of each case; as the court of appeals noted (Pet. App. 65a, n.6), one authority has identified as many as 14 different factors that the Commission considered in deciding whether given arrangements were "in substance" for-hire or private carriage.[2]

In the decision under review in this case, the Commission, after considering the written and oral comments of more than 200 persons, firms and associations, issued a policy statement in which it reexamined and reformulated the tests previously employed to distinguish for-hire from private carriage when equipment is leased to a private carrier. Pet. App. 1a-58a. Notwithstanding petitioners' claims, the Commission's basic analytic approach did not depart dramatically from prior decisions. Thus, it

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[2] Although the Commission applied the *Church* presumption to single-source leasing by shippers, it did not apply the same presumption with respect to single-source leasing by certificated, for-hire, motor carriers. That is, the Commission did not presume that an owner-operator who leased his services and equipment to a regulated carrier was engaged in "for-hire" transportation requiring him to obtain his own certificate from the Commission; in fact, the Commission's regulations specifically provide for such leasing (49 C.F.R. §§ 1057.11 and 1057.12.) Consequently, until the Commission adopted the decision under review, its decisions and regulations forced most uncertificated owner-operators to operate only under the aegis of regulated carriers.

stated at the outset: "We recognize the continued need to maintain a workable distinction between for-hire and private carriage." (Pet. App. 2a. See also Pet. App. 3a) Further, the Commission will continue to focus "on the control exercised [by the shipper] over a lessor" (*ibid.*). The policy statement also makes clear that the Commission will continue to examine the "substance" of the arrangement. Thus, it stated (*id.* at 27a; emphasis supplied):

> The crucial element, we believe, is precisely what services a lessor holds out to perform. If he holds out what is *in substance* a complete transportation service for compensation, then he is acting as a common or contract carrier . . ."

And later (Pet. App. 31a; emphasis supplied):

> We will not restrict our inquiry to the formal recitals of the lease agreement, but will—as in past—examine all surrounding facts and circumstances and the actual conduct of operations under the lease to ascertain if the *true substance of the arrangement* is in accord with that recited in the formal agreement.

The principal change the Commission effected was simply to eliminate the previous *presumption* that single-source leasing was for-hire transportation—a presumption the Commission found in practice to be "virtually irrebuttable." (Pet. App. 4a). The Commission concluded that the presumption was no longer warranted in view of dramatic changes in the motor carrier industry since 1935 and in view of the substantial changes in legislative purpose and policy reflected in the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793 (1980) (Pet. App. 20a-26a). In place of the former presumption against for-hire carriage, the Commission stated it would examine a number of factors to determine whether the shipper was assuming what this Court in *Drum* termed the "characteristic burdens of transportation." (Pet. App. 26a-34a). It further

identified six characteristics of a lease arrangement which must be met at a minimum to be deemed private carriage, including the lessee's maintenance of liability insurance, the lessee's bearing the risk of loss to cargo, and a minimum lease term of 30 days. (Pet. App. 34a-37a).[3] As noted, however, the Commission stated that it would continue to examine all the surrounding facts and circumstances in each case to determine whether the "true substance of the arrangement" (Pet. App. 31a) was private carriage.

The court of appeals affirmed (Pet. App. 59a-93a). It rejected petitioners' contentions that this Court's decision in *Drum* foreclosed the Commission's reformulation of the for-hire/private carriage distinction in this case and that it was inconsistent with the Motor Carrier Act of 1980. On the contrary, after reviewing the legislative history of that Act and noting "the fundamental change" effected by it (Pet. App. 90a, n.21), the court concluded that "the new policy is a rational response to the Commission's findings of changed circumstances" (Pet. App. 91a).

ARGUMENT

1. Contrary to petitioners' claims, this case presents no broad question of general importance or significant new interpretation of law, and there is no conflict among the circuits or other reason that would warrant this Court's review. On the contrary, what the case involves is merely the Interstate Commerce Commission's reformulation of the distinction, which the statute states in only general terms, between for-hire and private trans-

[3] In addition, the Commission listed ten other factors it viewed as being relevant to whether a particular operation was for-hire or private carriage. (Pet. App. 37a-60a)

portation and the elimination of a presumption it had previously employed regarding single-source lease arrangements. This reformulation involved no significant change in the Commission's view of the controlling principle but simply reflects its decision to determine the question on a case-by-case basis in light of the relevant factors rather than by application of the presumption previously used.

Moreover, although petitioners speculate that the Commission's administration of the new test will have a significant and adverse impact on the motor carrier industry, the judgment of the Commission—the expert agency that Congress established to make such assessments—is to the contrary. Thus after reviewing the present circumstances of both the regulated and the private sectors of the motor carrier industry, as well as the reduced barriers to entry into the regulated industry effected by the 1980 Motor Carrier Act, the Commission concluded (Pet. App. 21b):

> We do not believe that any action taken here will have a major effect on the overall balance between the regulated and private sectors of the industry.

On review, the court of appeals unanimously concluded that this assessment was reasonable (Pet. App. 90a). Beyond their own speculation, petitioners have offered no basis for this Court's reaching a different conclusion.

In any event, as the court of appeals also noted (Pet. App. 90a), this case is not an appropriate case to review petitioners' speculations about the possible impact of the Commission's application of its new approach. Any abuses of that approach or adverse consequences that will assertedly result from it may be reviewed in the context of specific complaint or enforcement proceedings, as this

Court did in the *Drum* case on which petitioners themselves rely.[4]

2. Furthermore, the court of appeals' decision was plainly correct, and petitioners' arguments to the contrary are without merit.

a. Petitioners American Trucking Associations, Inc., et al. ("ATA") and Ryder Truck Lines, Inc. ("Ryder") contend[5] that the Commission's decision is contrary to the Motor Carrier Act of 1980 because that Act did not change the statutory definitions of "motor common carrier," "motor contract carrier" and "motor private carrier." This argument is insubstantial. The fact that the 1980 Act did not change the definitions plainly does not preclude the Commission from reconsidering and reformulating the tests previously employed for distinguishing one type of carrier from another. Indeed, ATA *admits* (Pet. No. 83-943 at 13) that "[b]ecause [the statutory definitions] are imprecise, the Commission is permitted some discretion in forming a workable test . . . ." The Commission's authority to adopt a new formulation is not only admitted by ATA but is also clear from this Court's decisions. As the Court stated in *American Trucking Associations, Inc.* v. *Atchison, T. & S.F. Ry. Co.*, 387 U.S. 379, 416 (1967):

> [T]he Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretations and over-

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[4] Moreover, although petitioner American Trucking Associations, Inc. cites *Drum* as an example of a case this Court found sufficiently important to review on certiorari (Pet. No. 83-943 at 5), it overlooks that *Drum* was not reviewed on certiorari but was a direct appeal from a three judge court decision under 28 U.S.C. § 1253.

[5] Pet. No. 83-943 at 6-10; Pet. No. 83-1030 at 16-18.

> turn past administrative rulings and practices . . . . Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

Furthermore, the Commission correctly found substantial affirmative support in the policies and provisions of the 1980 Act for its decision in this case. In particular, that Act significantly reduced the regulatory barriers to obtaining for-hire authority from the Commission. As the Commission noted, this change reflected Congress' lessened concern with protecting the regulated industry from new competition, and also reduced the likelihood that persons would use the form of private carriage as a subterfuge to evade regulation (Pet. App. 24a-25a).[6] Indeed, the decision under review is consistent in approach with many others in recent years, both before and after the 1980 Motor Carrier Act, which have reduced the

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[6] ATA and Ryder argue, in essence, that because the 1980 Act did not completely deregulate the motor carrier industry, it reflects some residual protectionist purposes that the Commission's decision here undermines (Pet. No. 83-943 at 6-9; Pet. No. 83-1030 at 15-18). In view of what the court of appeals correctly noted as the "fundamental change" effected by the 1980 Act (Pet. App. 90a, n.21), this argument is like describing the doughnut in terms of the hole. As the court of appeals for the Fifth Circuit recently stated, rejecting the same argument in another case: "Notwithstanding that Congress did not completely deregulate the trucking industry, the 1980 amendments unquestionably embody a strong new deregulatory philosophy." *American Trucking Associations, Inc.* v. *ICC*, 5th Cir. Nos. 81-4389, 83-4039 (January 20, 1984) (slip op. at 1674).

regulatory strictures on the motor carrier industry and opened it to greater competition.[7]

In addition, petitioners overlook the fact that the Commission also based its decision on fundamental changes that have occurred in the motor carrier industry, which today "bears little resemblance to the precarious, fragmented, and unstable industry of the mid-1930's." (Pet. App. 20a). Petitioners do not challenge this basis of the Commission's decision, although the court of appeals found it to "provide[] a rational basis for reconsidering and rejecting the presumptions announced in *Church* and *Oklahoma Furniture*." (Pet. App. 90a.)

b. Petitioners ATA and Ryder also contend[8] that the decision of the court of appeals conflicts with a decision of the Fifth Circuit because the Commission found support for its decision in, among other things, the 1980 amendments to the National Transportation Policy (set forth in 49 U.S.C. § 10101) which stress the promotion of "competitive and efficient transportation services." This strained effort to find a conflict among the circuits is wholly without merit.

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[7] See, *e.g.*, *American Trucking Associations, Inc.* v. *ICC*, 5th Cir. Nos. 81-4389, 83-4039 (January 20, 1984) (affirming ICC decision removing constraints on railroad entry into motor carrier industry); *Mercury Motor Express, Inc.* v. *United States*, 648 F.2d 315 (5th Cir. 1981) (affirming ICC decision allowing private carriers to obtain for-hire authority); *Assure Competitive Transportation, Inc.* v. *United States*, 635 F.2d 1301 (7th Cir. 1980) (affirming ICC policy statement reducing burdens on applicants for new certificates to provide greater competition); *Regular Common Carrier Conference of the American Trucking Associations, Inc.* v. *United States*, 628 F.2d 248 (D.C. Cir. 1980) (affirming ICC decision removing presumptions limiting contract carrier operations);

[8] Pet. No. 83-943 at 10-13; Pet. No. 83-1030 at 14-15.

First, *Central Forwarding, Inc.* v. *ICC*, 698 F.2d 1266 (5th Cir. 1983), the allegedly conflicting decision, involved a completely different issue and has no relevance to this case. In *Central Forwarding*, the Commission promulgated rules regarding a matter over which it had no jurisdiction—rules mandating the levels of compensation regulated carriers were required to pay owner-operators—and the court rejected the Commission's argument that the National Transportation Policy alone gave it authority to promulgate the rules. Here there can be no serious contention that the Commission lacks the authority to state, and from time to time re-state, what distinguishes for-hire from private carriage; indeed, as noted, petitioner ATA admits the Commission has that authority. See also *American Trucking Associations, Inc.* v. *Atchison T & S.F. Ry, supra.* In exercising that authority, it was clearly proper for the Commission to consider—among other matters—the National Transportation Policy and changes to it; indeed, it would have been improper for it not to.

Furthermore, a recent decision of the Fifth Circuit should lay to rest any suggestion that that court believes the Commission may not rely on the National Transportation Policy in its policy statements. In *American Trucking Associations, Inc.* v. *ICC*, 5th Cir. Nos. 81-4389, 83-4039, that court upheld the Commission's decision to abolish a long-standing doctrine that had restricted railroad entry into the motor carrier industry, and it relied specifically on 1980 amendments to the National Transportation policy in doing so (slip op. at 1676).

c. The court of appeals correctly rejected petitioners' further arguments[9] that the Commission's deci-

[9] Pet. No. 83-943 at 13-17; Pet. No. 83-1030 at 11-12; Pet. No. 83-1119 at 13-17.

sion conflicts with this Court's decision in *United States* v. *Drum*, *supra*. The opinion in *Drum* made quite clear that this Court's decision rested on its deference to the Commission's *discretion* to fashion workable distinctions in administering an imprecise statute, and did not intend to lock the agency forever into the particular formulation upheld in that case. See 368 U.S. at 375-376, 385-386 and pages 4-5 *supra*. Certainly nothing in this Court's decision remotely suggested that the statute required the Commission to presume from one factor alone—a single-source lease—that transportation is for hire. If anything, the thrust of the opinion is to the contrary, since it stated (368 U.S. at 384): "We deal in totalities; indicia are instruments of decisions, not touchstones."[10]

Furthermore, as noted in the Statement, *supra*, the Commission's decision here does not reject, but in fact reaffirms, the basic principles set forth in *Drum*, *Church* and *Oklahoma Furniture*. Thus, the Commission reaffirmed the "need to maintain a workable distinction between for-hire and private carriage" (Pet. App. 2a), and it made clear that it will continue to focus heavily on the shipper's control of the transportation service and will in all cases examine whether the transportation is in "substance" for hire. Petitioners' contention that the Commis-

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[10] Moreover, in upholding the Commission's discretion in that case, the Court relied on the principal policy of the 1935 Act, which reflected "congressional concern over diversions of traffic which may harm existing carriers . . . ." 368 U.S. at 375. As outlined by the Commission and the court of appeals here (Pet. App. 23a-26a, 82a-90a), the 1980 Motor Carrier Act reflected a new congressional policy favoring substantially greater competition. *Drum* itself therefore suggests the appropriateness of the Commission's reexamining its *Oklahoma Furniture* decision in light of the change in legislative policy.

sion has adopted a significantly different "test" is simply unfounded; what they are really complaining about is the Commission's decision no longer to presume automatically that transportation by an owner-operator who is not on the private carrier's payroll as an "employee" is for-hire transportation.

d. Petitioner National Association of Regulatory Utility Commissioners ("NARUC"), which did not file comments with the Commission in this proceeding, now argues that the Commission's decision will significantly impair the ability of the States to enforce the licensing provisions of the Interstate Commerce Act. The judgment of the commission with the principal responsibility for enforcing those provisions, however, was that its decision would not lead to substantial evasions because, among other things, the reduced "barriers to entry of new carriers into the regulated industry [under the 1980 Act] has also reduced any incentives such carriers may have to devise subterfuges to remain outside the reach of regulation." (Pet. App. 25a.) Furthermore, as the court of appeals noted (Pet. App. 91a), the Commission "will continue to ferret out for-hire schemes which purport to be private carriage."

Although NARUC disputes that judgment for various reasons, it offers no justification for asking *this* Court to address NARUC's concerns when they were evidently not deemed sufficiently important by it to present to the agency in the first instance.

In any event, NARUC's claims are unpersuasive. Thus, NARUC claims that officers checking trucks at road check points will have difficulty under the Commission's decision determining whether a given driver is engaged in bona fide private carriage. Whether this determination was substantially easier before the Com-

mission's decision is questionable, however, in view of the fact, as the court of appeals noted, that the "control" and "substance" tests as they were applied in *Church, Oklahoma Furniture* and other decisions took into account as many as 14 different factors. Moreover, it is difficult to see why there should be any substantial difficulty in this regard, in light of the fact, as NARUC itself asserts, that 27 states presently require interstate carriers exempt from ICC jurisdiction, *including private carriers*, to "register their operations [with the State], to maintain adequate levels of insurance, and to designate local process agents." Pet. No. 83-1119 at 7, n.6. This clearly indicates that the supposed problems that NARUC has pointed out regarding checking credentials, maintaining proper insurance, etc., are ones that can be remedied by the States themselves.[11]

CONCLUSION

The petitions for a writ of certiorari should be denied.

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[11] NARUC's concerns about the use and abuse of oral leases (Pet. No. 83-1119 at 10-11) are fanciful. It is simply implausible to suppose that it would be more than the rarest of occasions in which private carriers would entrust their property to owner-operators or other lessors solely on the basis of some oral arrangement.